INDEX.

PAGE

Petition for writ of certiorari to the United States Court of Appeals, Tenth Circuit 1

Summary statement of the matter involved..... 2

Basis of the court's jurisdiction 7

Questions presented 9

Reasons relied upon for allowance of the writ.... 10

Brief in support of petition for certiorari..... 13

Statement of the case 13

Specification of errors 13

Argument and authorities 13

The opinion herein approves the loose and unsound rules adopted by the trial court, viz.: " * * that ordinarily it would be inclined to resolve the doubt against jurisdiction, but under these peculiar circumstances it was persuaded to resolve doubt in favor of jurisdiction," making Federal jurisdiction a matter, not of law, but within the discretion of the trial court* 15

Federal jurisdiction cannot rightly be premised upon the wrongful exercise of it, regardless of the lapse of time during which such jurisdiction is wrongfully exercised 17

Leave to amend motion to remand applied for immediately after technical defects were first suggested should have been granted 19

Certiorari should be granted 20

TABLE OF CASES.

Atlas Life Ins. Co. v. W. I. Southern Co., Inc., 59 S. Ct. 657, 306 U. S. 563, 83 L. ed. 987, 105 F. (2d) 668, 23 Fed. Supp. 334 18

Ayers v. Wishwall, 112 U. S. 187, 28 L. ed. 693..... 18

TABLE OF CASES—Continued.

PAGE

C., B. & Q. Ry. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. ed. 521 16

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 80 L. ed. 1135 18

Norton v. Larney, 289 Fed. 395, 45 S. Ct. 145, 266 U. S. 511, 69 L. ed. 413 18

Realty Holding Co. v. Donaldson, 294 Fed. 541, affirmed 45 S. Ct. 521, 268 U. S. 398, 69 L. ed. 1014..... 18

Riggs v. Johnson County, 73 U. S. 166, 18 L. ed. 768.. 18

Royalty Service Corp. v. City of Los Angeles, 98 F. (2d) 551 .....16-17, 18

St. Louis Smelting & Refining Co. v. Nix, 272 Fed. 977 (C. C. A. 10) 16

United States, ex rel. Counsel of Keokuk, 73 U. S. 518, 18 L. ed. 918 18

United States v. Green, 107 F. (2d) 19 17

Statutes and Rules.

U. S. C. A., Title 28, Sec. 80 .....17, 20

U. S. C. A., Title 28, Sec. 723, Rule 15..... 19

U. S. C. A., Title 28, Sec. 777..... 20

Rule 38, para. 5 (b) 8

Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stats. at L. 938, 28 U. S. C. A. 347) 8

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. .....

GERALD F. UPDIKE, MRS. GRACE PEARL UPDIKE, LEON W. UPDIKE, AND JAMES M. UPDIKE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF UPDIKE AWNING COMPANY,

Petitioners,

vs.

IVAN M. WEST, J. C. DUNLAP, P. N. NACHEFF, NATIONAL BANK OF TULSA, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,

Respondents.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Petitioners, Gerald F. Updike, Mrs. Grace Pearl Updike, Leon W. Updike, and James M. Updike, partners doing business under the firm name of Updike Awning Company, respectfully pray certiorari to review a decision of the United States Court of Appeals, Tenth Circuit, affirming a judgment of the United States District Court for the Northern District of Oklahoma, entered in a suit in which

petitioners were plaintiffs and respondents West, Dunlap, Nacheff and National Bank of Tulsa were defendants. Respondent Bonding Company was made party after removal, and after removal the suit was dismissed by agreement as to the bank, and the questions herein affect their rights only by virtue of these circumstances.

The judgment complained of was entered in an action removed to the United States District Court from a court of general jurisdiction established under the laws of the State of Oklahoma. Petitioners contend that exclusive jurisdiction of the controversy was and is vested in the state court in which they filed the law suit; the decisions complained of hold that jurisdiction is in the federal court.

The opinion of the U. S. Court of Appeals, Tenth Circuit, which does not appear in any published reports, appears in the record herewith presented and made part hereof at pages 303 to 307; the judgment of the District Court at pages 153 to 155 thereof.

Summary Statement of the Matter Involved.

Prior to the 6th day of March, 1944, a widow and three sons operated a business partnership under the name of Updike Awning Company. They had undertaken for the United States the manufacture of war supplies, and to execute the contracts had borrowed money from the Federal Reserve Bank through its affiliate, the National Bank of Tulsa. Two of the sons had enlisted in the military service and a third was preparing to go, which circumstances, and the advanced age of the mother, made it necessary to perfect arrangements to carry on the business during the absence of the sons. With this end in view, a contract was prepared and executed (R. 15), under the terms of which the

partners turned over management of the business to Ivan M. West for a period beginning March 6, 1944, and ending, with certain immaterial conditions, April 1, 1945. Upon the same day, West in turn employed Dunlap and Nacheff as production managers of the business for the same term. With exceptions immaterial to the issues herein, West, Nacheff, and Dunlap were to be paid at the termination of the management contract.

Operating under this agreement, these three managers within the first six months reduced the firm's obligations to the federal lending agencies, from $100,000 to $53,267. The war continuing, and in anticipation that the sons would not return until after the original management contract expired, a new management contract was executed. At that time the managers represented to the partners that by April 1, 1945, there would be sufficient earnings and liquid assets available to discharge the firm's debts, and under the new contract agreed to provide operating capital beginning April 1, 1945.

On April 21, 1945, the partners filed suit in the state court against the managers and the National Bank of Tulsa (R. 1) setting forth substantially the facts hereinabove and charging that during the period of six months following the execution of the contract for extended management, the managers had fraudulently dissipated the partners' money and property, incurring and paying excessive and unnecessary charges for traveling, hotel bills, and wages; that they disbursed for auditing alone a sum in excess of $1,000 per month, had discontinued payments upon the firm's obligations, had borrowed on March 28, 1945 (before they were entitled to collect under their management contract), the sum of $25,000.00 which, to the extent of $22,500.00, they, with the full knowledge and approval of the bank, immediately con-

verted to their own use with the result that when the sons returned they found their business in the hands of a receiver.

The partners claimed damages in the sum of $75,000.00 with interest and costs.

The petition plead the substance of the three management contracts, but did not append copies.

The managers (but not the bank) joined in a petition for removal of the cause to the federal court (R. 11). The petition for removal (R. 11-28), so far as material here, averred unequivocally and in detail that federal jurisdiction existed on the ground of complete diversity of citizenship. Fraudulent joinder was alleged on the loose ground that the cause of action against West is separable as to him, "and further that said defendants Dunlap and Nacheff are improperly and fraudulently made parties defendant to this cause for the sole purpose of preventing removal * * *, which is evidenced by the fact that plaintiff did not attach copies of the said separate contracts to their petiion filed herein or otherwise refer to said written contracts which upon their face show that there was no joint cause of action." (R. 14)

To the petition for removal was attached, as Exhibit A, the agreement whereby the partners employed West, and, as Exhibit B, the agreement whereby West in behalf of the partners employed Nacheff and Dunlap, and, as Exhibit C, a letter dated the same date, from the partners to the bank respecting the two contracts. The contract for extended management executed by all the managers jointly and set forth in the petition was in no manner referred to in the petition for removal, nor was any copy of this agreement appended.

Since the removal petition asserted positively and unequivocally that neither the bank, West, Nacheff nor Dunlap were local residents, it is clear that the petition for removal did not plead facts showing a fraudulent joinder. The essence of such pleas is the improper or fraudulent joinder of *a local citizen* in an action against a non-resident to defeat federal jurisdiction. If there is, as the removing managers say, in fact *no resident defendant joined at all,* it is clear that they failed to allege facts to show federal jurisdiction on any ground except diversity of citizenship.

Motion to remand was promptly filed in the federal court (R. 30) in which the partners alleged that jurisdiction was rightly vested in the state court denied there was a diversity of citizenship, asserted that the petition for removal was insufficient to invest the federal court with jurisdiction and that the suit was not removed in the manner required by law.

Proceeding upon the theory that the only issue properly tendered by the record was that of diversity of citizenship, the trial judge, after hearing evidence upon this issue, first found as a fact that West, Nacheff and Dunlap were each and all residents of the State of Kansas.

Subsequently the partners discovered new and additional evidence to disprove the contention that the managers were all non-residents. They made application to the court and were granted leave to file a second motion to remand (R. 117). The evidence supporting this motion was so conclusive that the trial court then found as a fact that there was no complete diversity of citizenship and that federal jurisdiction on this ground did not exist. (R. 238)

However, instead of remanding the case to the state court, the trial judge overruled the motion to remand and

retained jurisdiction upon the sole ground of fraudulent joinder of West with Nacheff and Dunlap. (R. 239)

The trial judge indicated that his decision was influenced to some degree by failure of plaintiffs in their motion to remand to more specifically traverse the allegation of fraudulent joinder. (R. 238)

The partners contended that they were not required to traverse in detail a plea that was itself inadequate, or to deny what the managers had not themselves alleged.

Out of an abundance of caution, they also asked leave to amend their motion to remand to more specifically traverse the plea of fraudulent joinder.

The trial judge denied leave to amend notwithstanding the liberal provisions of the rules and the statute and the circumstance that leave to amend was sought immediately on the first occasion when any inadequacy in the motion to remand was suggested.

Prior to that date both the trial judge and the managers had proceeded in offering and receiving evidence upon the theory that fraudulent joinder was at issue under the pleadings. The managers tried but failed to establish as a fact that there was such fraudulent joinder. (R. 226-232)

The trial judge, noting the plaintiffs' contention that defendants had not alleged sufficient facts to establish the charge of fraudulent joinder, said in substance:*

> It is a rather close question. The statement in the petition for removal is not a statement of any facts from which a conclusion could be reached that there was a fraudulent joinder. Defendants rely upon failure to attach contracts which show that there was no joint cause of action. This is an action on the contracts.

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*For full text of the judge's remarks see R. 242-246.

Under ordinary circumstances I might be inclined to resolve doubt in favor of the state court's jurisdiction, but I am persuaded to resolve any doubt I have in favor of retaining the jurisdiction because of developments since removal.

For this reason also I deny application for leave to amend motion to remand.

The jurisdiction is largely a technical proposition anyway.

If plaintiff desires I will arrange for another judge to try the case.

The case was assigned for trial. The partners elected to stand on the proposition that the federal court was without jurisdiction, declined to present further evidence and judgment of dismissal for want of prosecution was entered, from which an appeal was prosecuted to the United States Court of Appeals for the Tenth Circuit with the result heretofore stated.

Basis of the Court's Jurisdiction.

Petitioners respectfully show that they are entitled to certiorari for that:

1. That the federal court has wrongfully assumed and exercised jurisdiction of a cause of action, of which the District Court of Creek County, Oklahoma, had exclusive jurisdiction, in violation of the Constitution and laws of the United States, and the rights of petitioners thereunder; that thereby they have been deprived of property without due process of law.

2. That the Circuit Court of Appeals for the Tenth Circuit has decided an important question of federal law, the

effect of which is to deny a right to amend motion to remand which has not been but should be settled by this Court.

3. That said court has decided a federal question, *viz.*, whether doubts are to be resolved in favor of rather than against federal jurisdiction in a way in conflict with applicable decisions of this Court, and of other circuits.

4. That said court has sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this Court's power of supervision.

Jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347) and under Para. 5 (b) of Rule 38.

The decree of the United States Court was entered October 24, 1947 (R. 153); the final opinion of the United States Court of Appeals for the Tenth Circuit, upon appeal timely prosecuted, March 7, 1949 (R. 32), and on March 16, 1949, conformable to the rules, said federal circuit by order stayed its mandate pending filing on or before April 16, 1949, of the instant proceedings.

Questions Presented.

Petitioners respectfully submit that it was error in effect for the courts below to hold:

1. That a petition for removal which denies unequivocally that any local citizen has been joined as a defendant pleads facts to show federal jurisdiction for fraudulent joinder.

2. That under the rules of civil procedure and the federal law a motion to remand could not be amended, particularly where absence of federal jurisdiction was doubtful or apparent on the face of the record.

3. That federal jurisdiction is largely a technical proposition anyhow and since a decision on this question did not dispose of the matter on the merits the error, if any, could be compensated by referring the case to another judge for trial.

4. That because of "developments" in the federal court in a removed case, doubt should be resolved in favor of rather than against federal jurisdiction.

5. That where by false assertions respecting their residence parties defendant induce the federal court to exercise unauthorized jurisdiction on the ground of diversity of citizenship, lawful jurisdiction on some other ground may stem from such wrongful exercise of it.

6. That a federal trial judge may impose arbitrary limits as to the time or manner under which absence of federal jurisdiction apparent on the face of the record may be asserted prior to judgment.

Reasons Relied Upon for Allowance of the Writ.

The decree and opinion complained of were entered in an action of which clearly the state court had exclusive jurisdiction.

The federal courts below resolved doubt in favor of federal jurisdiction. They adopted the premise that federal jurisdiction is largely technical anyhow.

Because by false allegations of residence the managers had induced the federal court to exercise jurisdiction, the court penalized the partners by compelling them to try their law suit in a forum selected by the managers, and in which the partners' right to trial by jury was doubtful.

The federal courts below either ignored or dismissed as largely technical the obvious fact that in an action instituted by plaintiffs, all of whom are admitted to be local residents, to properly plead fraudulent joinder in a petition for removal an indispensable requisite is an allegation that for some purpose at least there is a joinder of a local citizen as a defendant.

Inferences and doubts were indulged to aid vague and contradictory allegations of fraud clearly not well pleaded in a petition for removal.

The liberal rules of federal procedure permitting amendments were disregarded without just or satisfactory cause or reason, obscuring to a degree the jurisdictional issues.

The reasons assigned and the circumstances under which the Court of Appeals and the Federal District Court proceeded are novel and unusual; they constitute such a definite departure from established precedent, both in the

Tenth Circuit and elsewhere in the United States, that grave doubt and confusion will result in removed cases concerning a question of primary importance, *viz.*, whether the federal or state court has jurisdiction over the controversy. Under this precedent, jurisdiction becomes a matter not of law or right, but resting in the unlimited discretion of the trial judge. Jurisdiction will depend on which way he is inclined to resolve doubts, rather than upon the facts or the law.

The way is opened to a flood of new cases in the federal courts, for litigants will be encouraged to impose upon the jurisdiction of the federal court by false allegations respecting residence in the hope that having thus persuaded them to exercise jurisdiction for a time, they may thereby acquire jurisdiction.

The decree and decision complained of are in direct conflict with applicable provisions of the Constitution and laws of the United States and other decisions of this Court and other circuits upon the identical questions.

Wherefore, petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit.

GLENN O. YOUNG,
Sapulpa, Okla.,
Attorney for Petitioners.

April 4, 1949.

BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI.*

The petition for certiorari, *supra,* includes:

(A) Reference to the unreported opinion and judgment of the courts below, not yet officially reported, and,

(B) A concise statement of the grounds on which the jurisdiction of this court is invoked.

Statement of the Case.

The petition for certiorari contains also a concise statement of all that is material to a consideration of the questions presented, supported by appropriate page references to the printed record. Such matters are for brevity incorporated by reference.

Specification of Errors.

The errors complained of are as set forth in the petition for certiorari at page 9 under the caption "questions presented."

Argument and Authorities.

Because of their obvious nature, the errors assigned are not herein separately briefed or argued.

The cases cited by the Court of Appeals are adopted as correctly stating the law. Under these cases it was the clear duty of the Court of Appeals to reverse the decision of the trial court with directions to remand.

Apparently proceeding upon the theory that the federal court may acquire jurisdiction, like riparian owners sometimes acquire title to real property, by accretion, opposing counsel required the partners (R. 159 to 163) at

great expense to bring forward a mass of irrelevant matter, no part of which is material to any issue here or in the Court of Appeals.

While the voluminous nature of this record may tend to obscure the jurisdictional issue, scrutiny will show clearly that at the trial and in the Court of Appeals the sole issue upon which the partners stood was lack of jurisdiction in the federal court to try a law suit which they had instituted in the state court.

It will be observed that in the judgment itself, although it is recited that plaintiffs choose to stand on the issue of federal jurisdiction and request the court to consider all evidence offered on this issue, no findings are made respecting it. (R. 153)

If the question of jurisdiction, as the trial judge suggested, was largely technical anyhow, it would seem as much the right of the partners to assert state jurisdiction as it was that of the managers to select the federal forum.

It was pointed out to the court that the contract of Nacheff and Dunlap was signed by West, but this proposition the court dismissed with a statement, "That will be the order." (R. 246) Request was made to the trial court for leave to amend the answer, to plead to the jurisdiction of the court (R. 248), the judge stated: "My ruling is that I will not permit you to amend for the purpose of traversing the allegation of a fraudulent joinder." (R. 249)

An amended petition with amendments thereto filed in the federal court by leave or order of the court, other than the motions to remand, did show a good faith joinder of the defendants and did append or adopt by reference copies of the management agreements. (R. 36-45; R. 58-61)

That there was in truth no fraudulent joinder of any of the parties—not even a misjoinder—is conclusively established by noting that the case was actually treated and tried as joint cause of action after removal. There was no finding and no contention after removal that the partners had joined a fictitious party against whom they were not in good faith asserting a cause of action. The plea of fraudulent joinder in the petition for removal was a mere pretext relied upon to give color of authority to proceed in the federal court.

Certiorari should issue, it is respectfully submitted, to prevent an obvious and unwarranted usurpation of jurisdiction by the federal court in a case over which the state court had lawful jurisdiction, and to clarify and declare the law governing the right to amend a motion to remand.

The opinion herein approves the loose and unsound rules adopted by the trial court, *viz.*: " * * * that ordinarily it would be inclined to resolve the doubt against jurisdiction, but under these peculiar circumstances it was persuaded to resolve doubt in favor of jurisdiction," making Federal jurisdiction a matter, not of law, but within the discretion of the trial court.

Under the opinion herein, the Tenth Circuit approves a rule whereby the question of whether federal jurisdiction exists in doubtful cases is not one of law but a matter committed to the discretion of the trial judge. Such a rule leaves jurisdictional questions so in the realm of speculation and conjecture that it should be approved only after the most careful weighing of the consequences, and the circumstances under which doubts are to be resolved in favor of rather than against federal jurisdiction should be stated with clarity.

The "peculiar circumstance" to which reference is made must have referred to the extensive hearings resulting from the false allegation of the removing defendants that there was a complete diversity of citizenship. To say that the removing defendants may remove a case by false allegations respecting their residence, conceal the facts and deceive the court, and put their adversaries to long, tedious and expensive investigations to establish to the satisfaction of the court the falsity of such allegations, then benefit from the delay so caused, is to allow them to reap a reward for their own wrong. Surely the wrongful conduct of a defendant who seeks to establish federal jurisdiction does not justify resolving doubts in his favor.

In *St. Louis Smelting & Refining Co.* v. *Nix,* 272 Fed. 977, the Court of Appeals, Tenth Circuit, itself announced the rule that where the jurisdiction of the court appeared doubtful, the court should inquire fully into the issue, citing *C. B. & Q. Ry.* v. *Willard,* 220 U. S. 413, 31 Sup. Ct. 460, 55 L. ed. 521. From the opinion therein we quote:

> "The question of jurisdiction in the courts of the United States, those of first instance and those of appeal, is first and fundamental. The jurisdiction of the inferior courts of the United States rests wholly upon the Acts of Congress. It cannot be conferred by consent of the parties, or by their omission to contest it, or by estoppel, and whenever it appears, as it did in this case, that jurisdiction was probably lacking, it was the duty of the court to inquire into it, regardless of the attitude of the parties."

That presumptions are *against* rather than in favor of federal jurisdiction has heretofore been regarded as axiomatic.

> "Jurisdiction of the federal courts depends on the situation as it exists at the time the suit is brought and

subsequent events neither confer nor divest it. *Mutual Life Ins. Co.* v. *Rose,* (D. C. Ky., 1923) 294 F. 122; *Cohn* v. *Cities Service Co.,* (2d Cir., 1930) 45 F. 2d 687; *Ford, Bacon & Davis, Inc.,* v. *Volentine,* (5th Cir., 1933) 64 F. 2d 800."

—*Royalty Service Corp* v. *City of Los Angeles,* 98 F. (2d) 551.

"The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record. *Lehigh Mining & Mfg. Co.* v. *Kelly,* 160 U. S. 327, 337, 16 S. Ct. 307, 40 L. ed. 444."

—*United States* v. *Green,* 107 F. (2d) 19.

Federal jurisdiction cannot rightly be premised upon the wrongful exercise of it, regardless of the lapse of time during which such jurisdiction is wrongfully exercised.

In this connection, it is respectfully insisted that this Court note the plain and unambiguous provisions of the governing statutes of the United States which, so far as material, read:

"If in any suit * * * removed from a state court * * * it shall appear to the satisfaction of said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court * * * the said District Court shall proceed no further therein, but shall * * * remand it to the court from which it was removed * * *."

—Title 28, U. S. C. A., Sec. 80.

This provision of the U. S. Code contains no limitation upon the time for remand of a case not properly within the

jurisdiction of the federal court. The plain provision of the code is:

> "If * * * at any time after such suit has been *** removed thereto."

Neither the code provision nor the rules, so far as counsel can discover, contain any limitation as to the time in which a motion to remand may be made. Among many cases by the Supreme Court of the United States and other federal circuits, construing the foregoing statute, attention is respectfully invited to the following: *Riggs* v. *Johnson County,* 73 U. S. 166, 18 L. ed. 768; *United States, ex rel. Counsel of Keokuk,* 73 U. S. 518, 18 L. ed. 918; *Atlas Life Ins. Co.* v. *W. I. Southern Co., Inc.,* 59 S. Ct. 657, 306 U. S. 563, 83 L. ed. 987, 105 F. (2d) 668, 23 Fed. Supp. 334; *Norton* v. *Larney,* 289 Fed. 395, 45 S. Ct. 145, 266 U. S. 511, 69 L. ed. 413.

Under these cases it is the duty of a federal court to determine the question of its jurisdiction even though the question not be raised by either party.

In the federal court it has heretofore been regarded as never too late to consider the question of the court's jurisdiction, and if at any time the want of jurisdiction is apparent the duty of the court to arrest the proceedings. *Royalty Service Corp.* v. *City of Los Angeles, supra; Realty Holding Company* v. *Donaldson,* 294 Fed. 541, affirmed 45 S. Ct. 521, 268 U. S. 398, 69 L. ed. 1014.

A case may even be remanded after hearing and final decree if the order to remand is made before the close of the term. *Ayers* v. *Wishwall,* 112 U. S. 187, 28 L. ed. 693.

From *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178, 80 L. ed. 1135, the following is quoted:

> "The objection that jurisdiction to entertain the

suit did not exist is one which may be taken by answer. *Anderson* v. *Watt,* 138 U. S. 694, 34 L. ed. 1078, 11 S. Ct. 449. Indeed, under Section 37 it is the duty of the court, when it shall appear to its satisfaction that the suit does not really and substantially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the court may do whether the parties raise the question or not."

The same case expressly decides that in considering jurisdiction, the court is not bound by the pleadings of the parties.

Leave to amend motion to remand applied for immediately after technical defects were first suggested should have been granted.

In denying leave to amend the court stated:

"Under ordinary circumstances, I think I would permit leave to amend, particularly if the motion had been duly filed before a motion to remand was filed in this case."

The court's meaning is not clear, for obviously there would be no occasion to ask leave to amend a motion to remand before it was filed. The real reason leave to amend was denied appears revealed by the court's statement that jurisdiction is "*largely a technical proposition anyway.*" The court conceded the long delay and proceedings in the federal court were not the fault of the partners.

Aside from the rules (28 U. S. C. A. 723c, Rule 15), the federal statute contains the following further provision respecting amendments:

"No * * * declaration * * * or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed to

give judgment according to the right of the cause * * * without regarding any such defect or want of form * * * and the court shall amend every such defect and want of form, * * * and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

—28 U. S. C. A., Sec. 777.

That a motion to remand should be considered freely amendable seems sensible in view of the circumstance that neither the Code of Civil Procedure nor the federal statutes specify the manner in which questions of federal jurisdiction are to be raised. Title 28, U. S. C. A., Sec. 80.

Certiorari Should Be Granted.

The record herein discloses a grave departure from established judicial precedent in the United States. That so important a question as that of the jurisdiction of the federal court should depend upon the humor of the judge, upon the way he is inclined to resolve ill-founded doubts, is of great public moment. Whether federal jurisdiction is a question of law and fact rather than a matter of conjecture is neither a trivial nor an inconsequential nor a largely technical issue. Whether when jurisdiction is clearly not apparent from the face of the record, federal judges may ignore provisions of the rules of civil procedure and of the law to prevent challenges to their jurisdiction timely made and made in good faith are questions which, if doubtful, require a prompt and clear delineation to prevent confusion. If the principle that parties can by false allegations impose for a period upon federal jurisdiction and from this circumstance lawful jurisdiction may attach by accretion is to receive judicial sanction, the consequent increase in such

cases should be taken into account and the terms and conditions under which such federal jurisdiction will arise made clear and plain.

The petitioners believe it clearly established that they have been deprived of a right under the Constitution and laws of the United States to have their lawful claims adjudicated in a forum established by state law.

For the reasons stated, it is respectfully submitted that a writ of certiorari should issue, for they have no other recourse.

GLENN O. YOUNG,
Sapulpa, Okla.,
Attorney for Petitioners.

April 4, 1949.

INDEX.

PAGE

1. That a petition for removal which denies unequivocally that any local citizen has been joined as a defendant does not plead facts to show federal jurisdiction for fraudulent joinder 1

2. Under the rules of civil procedure and the federal law a motion to remand is amendable, particularly where absence of federal jurisdiction is doubtful or apparent on the face of the record..... 5

3. Federal jurisdiction is not "largely a technical proposition anyhow" and since a decision on this question did not dispose of the matter on the merits the error, if any, could not be compensated by referring the case to another judge for trial... 6

4. Because of "developments" in the federal court in a removed case, doubt should not be resolved in favor of rather than against federal jurisdiction.. 7

5. Where by false assertions respecting their residence parties defendant induce the federal court to exercise unauthorized jurisdiction on the ground of diversity of citizenship, lawful jurisdiction on some other ground may not stem from such wrongful exercise of it 7

6. A federal judge may not impose arbitrary limits as to the time or manner under which absence of federal jurisdiction apparent on the face of the record may be asserted prior to judgment..... 8

Conclusion 9

Table of Cases.

C. B. & Q. Ry. v. Willard, 220 U. S. 413, 31 S. Ct. 460, 55 L. ed. 521 8

Hunter v. Illinois Central Railway Co., 188 Fed. 645.. 5

TABLE OF CASES—Continued.

PAGE

Mansfield C. & L. M. R. Co., 111 U. S. 379, 28 L. ed. 463, 4 S. Ct. 510 8

McAllester v. Chesapeake & Ohio Railroad Co., 243 U. S. 302, 61 L. ed. 735, 37 S. Ct. 274..... 7

Statute.

Okla. Stats. Ann., Title 12, Sec. 140..... 8

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 714

GERALD F. UPDIKE, MRS. GRACE PEARL UPDIKE, LEON W. UPDIKE, AND JAMES M. UPDIKE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF UPDIKE AWNING COMPANY,

Petitioners,

vs.

IVAN M. WEST, J. C. DUNLAP, P. N. NACHEFF, NATIONAL BANK OF TULSA, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,

Respondents.

REPLY BRIEF.

Here, as in the courts below, respondents evade the issues of fact and law which warrant certiorari. Six specifications of error are set forth in the petition for certiorari at page 9 and adopted in the brief of petitioners at page 13

First petitioners assert:

1. That a petition for removal which denies unequivocally that any local citizen has been joined as a defendant does not plead facts to show federal jurisdiction for fraudulent joinder.

From the briefs it seems conceded that where the requi-

site amount is in controversy and there is a diversity of citizenship as to other parties, notwithstanding the presence of a resident defendant, a suit may be removed:

> "* * * if it is shown that the resident defendant was made a party for the fraudulent purpose of defeating removal."

And that:

> "Fraudulent joinder * * * like any other allegation of fraud must be pleaded with sufficient certainty to justify the conclusion that the joinder was a fraudulent device to prevent removal * * *."

Also that:

> "The misjoinder of parties or causes of action does not, without more, amount to a fraudulent joinder ***."

The petition for removal expressly avers:

> "* * * that these petitioners Ivan M. West, J. C. Dunlap and P. N. Nacheff, and each of them, were at the commencement of said suit and have been at all times since and are now residents of Wichita, Sedgwick County, Kansas. That the defendant, The National Bank of Tulsa, is a banking corporation or association organized under the laws of the United States of America. (R. 12) * * *
>
> "* * * that the state court where said case is now pending obviously has no jurisdiction over the defendant, National Bank of Tulsa, under the provisions of the applicable Statute of the United States of America providing for jurisdiction over a national banking association * * *." (R. 13)

Despite these unqualified assertions in the petition for removal, respondents' counsel assert (their brief, p. 11):

> "The removal petition did not claim * * * that the defendant National Bank of Tulsa was not a local resident of the State of Oklahoma."

This contention is answered by reference to the record and requires no further comment.

There is no allegation in the removal petition that any local resident has been joined at all. Absent such an allegation it is clear that the petition for removal does not plead the fraudulent joinder of a local resident for any purpose, much less for a fraudulent purpose.

The finding complained of involves the claimed fraudulent joinder of West, Nacheff and Dunlap. Neither the trial court nor the Circuit Court considered that there was alleged a fraudulent joinder of the bank. Counsel make no effort to answer the contention that if, as their removal petition avers, West, Nacheff and Dunlap are all non-residents, the petition shows no joinder of a resident defendant for any purpose, hence no fraudulent joinder.

If removing defendants are required to plead facts to show fraudulent joinder, they must first show which defendant is a local resident, then in what manner the joinder of that defendant is claimed to be fraudulent. For ought anyone could determine from the petition for removal, the evidence might have shown West rather than Nacheff to be a resident of Oklahoma. To sustain a plea of fraudulent joinder solely by reference to the petition for removal, the court is required to determine by divination or guess which removing defendant is a local resident, and also by the same process the manner in which the joinder of that particular defendant was fraudulent.

The only factual averment tending to show fraudulent joinder of West, Nacheff and Dunlap is:

> "* * * the fact that plaintiffs did not attach copies of the said separate contracts to their petition filed herein, or otherwise refer to said written contracts

which upon their face show there is no joint cause of action." (R. 14)

These contracts in no sense show fraudulent joinder. By the first contract (R. 15), the partners employed West, and by the second (R. 23) West, acting for the partners, employed Nacheff and Dunlap. The contracts were executed the same day, extended for the same period and covered the same general subject-matter. They did not show a separable controversy, much less a fraudulent joinder of a local resident.

Respondents' counsel, quibbling and straining technicalities, in their brief at page 4, assert unequivocally that there was no trial of the case. What they are attempting to say is that the petitioners confined the issue at the trial to the question of jurisdiction. (R. 249-251)

Again respecting petitioners' lawsuit they assert that:

"* * * it was never treated as a joint cause of action by anybody but the petitioners."

This contention is answered by observing that in the Federal court an amended petition was filed (R. 36) pleading a joint cause of action against all the managers and annexing the two contracts to which the managers alluded in their petition for removal. The managers West, Dunlap and Nacheff, joined in a motion to strike, to dismiss, and for a more specific statement (R. 54). This motion raised a great number of objections to the amended petition, but nowhere an objection that there was a misjoinder of causes of action, much less a fraudulent joinder of a local defendant against whom the petitioners did not in good faith assert a cause of action.

By answer and cross-petition the defendants Nacheff and Dunlap (R. 64ff) and West (R. 80ff) plead extensively

and in detail to the merits, but no where did they suggest either a misjoinder of causes of action or that plaintiffs were not in good faith prosecuting a joint cause of action.

The foregoing pleadings were before the court when the question of fraudulent joinder was under consideration by it, and at the trial. In *Hunter* v. *Ill. Central Ry. Co.*, 188 Fed. 645, cited by respondents in their brief at pages 5 and 6, it is stated:

> "Had it appeared on the trial of the case upon the merits that there was no separable controversy as to the removing defendants, it would have been the duty of the court to remand the cause * * *."

The issue of Federal jurisdiction was the first and primary one which the court should have considered and determined at the trial, but expressly refused to consider. Had this issue been considered on the record alone he would have been compelled to find that the joinder of West, Nacheff and Dunlap was not fraudulent; for the parties themselves had by failing so much as to raise such an issue conceded that their joinder was not only in good faith but proper as a matter of law.

2. Under the rules of civil procedure and the federal law a motion to remand is amendable, particularly where absence of federal jurisdiction is doubtful or apparent on the face of the record.

Respondents apparently concede this proposition but lay a predicate for irrelevant argument by wrongly charging that the petitioners "would have the rule construed to mean that the court can exercise no discretion in putting any kind of limit upon the extent and number of amendments * * *." Petitioners make no such contention. Leave to amend was applied for immediately upon the first sug-

gestion that there was any technical inaccuracy in the motion to remand (R. 239). The court then had under consideration an alias motion to remand, filed by leave of court. Both the trial court and the managers had proceeded to that point in offering evidence upon the assumption that fraudulent joinder was properly at issue under the pleadings. The court had stated specifically:

> "Of course, it is proper to hear evidence on an allegation of fraudulent joinder * * *," (R. 227)

and had admitted evidence to that issue.

Respondents distort the record when they assert that in the court's statement (R. 244):

> "Under ordinary circumstances I think I would permit leave to amend, particularly if the motion had been timely filed before a motion to remand was filed in this case,"

the word "filed" should be "overruled." The court could not have meant *overruled* for at the very time he had under consideration *the alias motion to remand, filed by leave of court.*

Petitioners do not contend that the rules permit amendments *ad infinitum* but do contend that alleged technical defects in motion to remand are amendable on timely application. The denial of the right to amend was absolute and unqualified.

3. Federal jurisdiction is not "largely a technical proposition anyhow" and since a decision on this question did not dispose of the matter on the merits the error, if any, could not be compensated by referring the case to another judge for trial.

The respondents make no effort to answer the soundness of this contention so it is taken as conceded.

4. Because of "developments" in the federal court in a removed case, doubt should not be resolved in favor of rather than against federal jurisdiction.

Respondents concede that "the question of jurisdiction in the courts of the United States, those of first instance and those of appeal, is first and fundamental * * * whenever it appears * * * that jurisdiction was lacking, it was the duty of the court to inquire into it, regardless of the attitude of the parties." (Their brief, pages 6 and 7.) This rule the trial court failed to observe.

5. Where by false assertions respecting their residence parties defendant induce the federal court to exercise unauthorized jurisdiction on the ground of diversity of citizenship, lawful jurisdiction on some other ground may not stem from such wrongful exercise of it.

Respondents attempt to argue that Federal jurisdiction attached because they succeeded by false statements respecting the citizenship and residence of Nacheff in removing the case to the Federal court and obtaining the exercise by the Federal court of jurisdiction in a case for an extended period; "It is now four years* that this case has been pending," they say (their brief, page 13), and they extensively detail proceedings had in the Federal court and elsewhere, even (knowing the case has never been tried) offer testimony and argue the facts.

"Without meaning to be facetious," they further declare, "petitioners must have had in mind the 'accepted and usual course of judicial proceedings' of their local Creek

(*In McAllester v. Chesapeake & Ohio R. R. Co., 243 U. S. 302, 61 L. ed. 735, 37 S. Ct. 274 (opinion by Mr. Justice CLARK), motion to remand a case wrongfully removed for alleged fraudulent joinder, had been filed July 21, 1902. The case was ordered remanded by this Court March 6, 1917, fifteen years after. Justice CLARK especially noted the long delay, but it seemed not seriously considered that federal jurisdiction might have been acquired by prescription.)

County court, where they had planned to keep Mr. West of Kansas to their advantage and his disadvantage." These contentions seem fully answered by observing that the question of Federal jurisdiction is not one of convenience or relative advantages to the one party or the other, but a question of law.

The jurisdiction of the inferior courts of the United States depend wholly on the Acts of Congress. It cannot be conferred by consent of the parties, or by their omission to contest it, or by estoppel. *C. B. & Q. Ry.* v. *Willard,* 220 U. S. 413, 31 S. Ct. 460, 55 L. ed. 521, and cases therein cited. Even had the partners waived the question of Federal jurisdiction they could have no assurance that the managers themselves might not raise the question even in this Court. See *Mansfield C. & L. M. R. Co.* 111 U. S. 379, 28 L. ed. 463, 4 S. Ct. 510.

The obvious remedy for respondents, if they fear they cannot have a fair trial in the local Creek County court, is to obtain a change of venue to another county, which they may do under the Oklahoma statute (12 O. S. A. 140). Petitioners are not meticulous about which court tries the merits of their lawsuit so long as its judgment when rendered may not be assailed for obvious jurisdictional defects.

6. A federal judge may not impose arbitrary limits as to the time or manner under which absence of federal jurisdiction apparent on the face of the record may be asserted prior to judgment.

That this proposition of law is sound seems conceded. A reference to the proceedings in the trial court shows that evidence was offered and received on the theory that the plea of fraudulent joinder was properly at issue under the pleadings (R. 226-229). When from the evidence, as well as

the pleadings in the Federal court as amended, it became clear that the joinder of all defendants was not fraudulent but in good faith, the trial judge of his own volition and without even a suggestion from respondents' counsel that such was the case, picked a technical flaw in the motion to remand and in advance of either arguments or briefs on the question denied petitioners an opportunity either to correct the motion to remand or otherwise bring the question of absence of jurisdiction to the attention of the court even at the date of the trial. (R. 238-249)

Conclusion.

It is clear that the petitioners have exhausted all other remedies to avoid the wrongful usurpation and exercise of jurisdiction by inferior Federal courts without avail, it is again earnestly submitted that the writ of certiorari should issue as prayed.

Respectfully submitted,

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Attorney for Petitioners.

May 5, 1949.

FILE COPY

FILED

GERALD P. OSBORN, [illegible]
LEON W. [illegible]
[illegible]
Petitioners,

vs.

IVAN M. WEST, J. C. BURLAS, F. H. HARRISON, NATIONAL BANK OF TULSA, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,
Respondents.

BRIEF OF RESPONDENTS, IVAN M. WEST AND MASSACHUSETTS BONDING AND INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX.

PAGE

Petitioners' first stated ground for certiorari..... 1

Petitioners' second stated ground for certiorari..... 4

Petitioners' third stated ground for certiorari..... 6

Petitioners' fourth stated ground for certiorari..... 8

TABLE OF CASES.

Gibson v. C. & O. R. R. Co., (C. C. A. 6) 215 Fed. 24.. 5

Hunter v. Illinois Central Ry. Co., 188 Fed. 645..... 5

Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327, 337, 16 S. Ct. 307, 40 L. ed. 444..... 7

Royalty Service Corp. v. City of Los Angeles, 98 F. (2d) 551 7

St. Louis Smelting & Refining Co. v. Nix, 275 Fed. 977. 6

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 714

GERALD F. UPDIKE, MRS. GRACE PEARL UPDIKE, LEON W. UPDIKE, AND JAMES M. UPDIKE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF UPDIKE AWNING COMPANY,

Petitioners,

vs.

IVAN M. WEST, J. C. DUNLAP, P. N. NACHEFF, NATIONAL BANK OF TULSA, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,

Respondents.

BRIEF OF RESPONDENTS, IVAN M. WEST AND MASSACHUSETTS BONDING AND INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, IN OPPOSITION TO PETITION FOR CERTIORARI.

The petition for certiorari filed herein apparently is intended to be based upon the four asserted grounds set out at pages 7 and 8 of the petition. We are unable to determine what portions of petitioners' argument apply to each of the stated grounds.

They contend, first:

"That the federal court has wrongfully assumed and exercised jurisdiction of a cause of action, of which

the District Court of Creek County, Oklahoma, had exclusive jurisdiction, in violation of the Constitution and laws of the United States, and the rights of petitioners thereunder; that thereby they have been deprived of property without due process of law."

In their following argument they say this:

"The cases cited by the Court of Appeals are adopted as correctly stating the law. Under these cases it was the clear duty of the Court of Appeals to reverse the decision of the trial court with directions to remand."

One may guess that they mean thereby to urge that there was no fraudulent joinder of the defendants. The District Court found as a fact that there was such fraudulent joinder and the Circuit Court of Appeals found the District Court was justified in so finding (R. 306), as shown in the following quotation from the Court of Appeals opinion:

"A separable controversy of the requisite amount, wholly between citizens of different states, may be removed to the federal court, notwithstanding the presence of a resident defendant, if it is shown that the resident defendant was made a party for the fraudulent purpose of defeating removal. *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92; *Pullman Co.* v. *Jenkins*, 305 U. S. 534; *Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U. S. 146. But fraudulent joinder, like any other allegation of fraud, must be pleaded with sufficient certainty to justify the conclusion that the joinder was a fraudulent device to prevent removal. A mere allegation of fraudulent joinder is not sufficient. *Kentucky* v. *Powers*, 201 U. S. 1, 34; *Wecker* v. *National Enameling Co.*, 204 U. S. 176; *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308, 316; *Chesapeake & Ohio Ry. Co.* v. *Cockrell, supra; Wilson* v. *Republic Iron & Steel Co., supra.* The pleader is the architect of his own lawsuit,

and the misjoinder of parties or causes of action does not, without more, amount to a fraudulent joinder. There must be a deducible bad faith purpose to defeat federal jurisdiction. *Alabama Great Southern Ry.* v. *Thompson,* 200 U. S. 206; *Wecker* v. *National Enameling Co., supra; Illinois Central R. R. Co.* v. *Sheegog, supra; Chicago B. & Q. Ry. Co.* v. *Willard,* 200 U. S. 413; *Mecom* v. *Fitzsimmons,* 284 U. S. 183; *Pullman Co.* v. *Jenkins, supra.*

"Here, however, as the trial court pointed out, the petition for removal did not stop with a bare allegation of fraudulent joinder of separable causes of action. It attached the contracts sued upon to show that the cause of action against West was based upon one contract, while the cause of action against Dunlap and Nacheff was necessarily upon another contract subsequently executed, each of which imposed separate and distinct duties and obligations. The allegation that these contracts formed the basis for the lawsuit was not challenged in the motion to remand, and they must therefore be taken as true. At most, the motion to remand raised only the legal sufficiency of the factual allegations. From an examination of the pleadings, in the light of the attached contracts, the court concluded that the actions being on the contracts, and not in tort as contended by the appellees, the causes of action were not joint; that, assuming the allegations of fraudulent joinder to be true, there was a joinder of separate and distinct causes of action, for the fraudulent purpose of preventing removal of the case to the Federal court. In so holding, the trial court recognized the closeness of the question, and observed that ordinarily it would be inclined to resolve the doubt against jurisdiction, but under these peculiar circumstances, it was persuaded to resolve the doubt in favor of jurisdiction. We agree with the trial court that the petition for removal stated a case for fraudulent joinder, and the allegations being unchallenged, justified a conclusion accordingly."

In petitioner's brief, page 15, they say:

> "That there was in truth no fraudulent joinder of any of the parties—not even a misjoinder—is conclusively established by noting that the case was actually treated and tried as joint cause of action after removal."

The Circuit Court's opinion (R. 305), and even the petition for certiorari (p. 7), shows sufficiently that there was no trial of the case, but that it was dismissed because plaintiffs refused to offer evidence. And that it was never treated as a joint cause of action by anybody but the petitioners is sufficiently shown by the result.

Petitioners' second stated ground for certiorari is:

> "That the Circuit Court of Appeals for the Tenth Circuit has decided an important question of Federal law, the effect of which is to deny a right to amend motion to remand which has not been but should be settled by this court."

In support of that they quote the statutory rule providing liberal relief for defects of form in pleadings; and apparently they would have that rule construed to mean that the courts can exercise no discretion in putting any kind of limit upon the extent and number of amendments a litigant may demand—*ad infinitum*.

The Circuit Court's opinion indicates to some extent (R. 303), the great amount of patience shown and indulgence granted by the District Court to the plaintiffs, and the reason why, after all the court had opportunity to see, hear and learn about the parties and their claims during the two and a half years, he felt justified in refusing to permit further amendment. On page 19 of petitioners' brief they try to put the District Court in a false light with a

quotation from a portion of the record which includes an obvious misprint. It would show the court as saying:

> "'Under ordinary circumstances, I think I would permit leave to amend, particularly if the motion had been duly filed before a motion to remand was filed in this case'."

The meaningless word "filed" shown therein should be "overruled."

The court had in fact, at that time, twice previously overruled motions to remand and had indulged and permitted numerous other amended pleadings of plaintiffs.

In a similar case and under similar circumstances, the Circuit Court of Appeals, Sixth Circuit, in *Gibson* v. *C. & O. R. R. Co.*, 215 Fed. 24, said this:

> "'There must be somewhere a limit beyond which the court is not bound to extend indulgence in entertaining applications of this nature, especially where, as here, no special reason therefor is shown. It is the abuse of discretion, not its proper exercise, that can be reviewed. Such discretion cannot be said to be improperly exercised even if, looking backward, we should think that in the same circumstances we might have exercised discretion differently'."

And in the case of *Hunter* v. *Ill. Central Ry. Co.*, 188 Fed. 645, another case involving the same question, the court said this:

> "'We think that in denying the motion to plead, under the circumstances shown, the court did not abuse its discretion. The request to join issue upon the petition for removal was delayed upwards of five months after the denial of the motion to remand upon the face of the record, more than five months after the continuance of the case by consent to the next term of court and the joinder of issue upon the merits, and upon the

very eve of trial upon the merits. No excuse for the delay is suggested by the record. Assuming, without deciding, that the plaintiff should have been permitted, upon a seasonable motion, to plead to the petition for removal, notwithstanding the denial of the motion to remand upon the face of the record, such request to plead should have been seasonably made. We think it was not seasonably made when presented at the late date and under the circumstances above stated. In such case permission to join issue upon the facts contained in the removal petition was, at the most, addressed to the discretion of the court, and it does not appear that such discretion was not properly exercised in denying the motion'."

* * * * * * * *

"'Had it appeared on the trial of the case upon the merits that there was no separable controversy as to the removing defendants, it would have been the duty of the court to remand the cause. But such question does not arise upon this record'."

The last above quoted paragraph from said decision is specifically applicable here, in the light of the fact that petitioners caused the case to be dismissed in the District Court, because they refused to stand trial and offer evidence upon the merits, thereby adding materially to the presumption of fraudulent joinder as shown in the removal petition.

For their third stated ground, petitioners say:

"That said court has decided a federal question, viz., whether doubts are to be resolved in favor of rather than against federal jurisdiction in a way in conflict with applicable decisions of this court, and of other circuits."

They cite three cases which they claim support that contention. Their first reference is to *St. Louis Smelting & Refining Co.* v. *Nix,* 272 Fed. 977, which is a decision of

the same Circuit Court as in this case. We do not need to go beyond the paragraph from that opinion quoted by petitioners, and with which we fully agree. In this case the Court in no sense departed from the fundamental rule therein announced.

Next they quote from *Royalty Service Corp.* v. *City of Los Angeles,* 98 F. (2d) 551, as follows:

> " 'Jurisdiction of the federal courts depends on the situation as it exists at the time the suit is brought and subsequent events neither confer nor divest it'."

In the present case jurisdiction on the ground of fraudulent joinder of the other defendants with defendant West, a resident of Kansas, was determined as of the time of removal from the Creek County, Oklahoma, court. Petitioners themselves, elsewhere in their petition, try to claim that their subsequent amended petitions divested the court of jurisdiction. The only subsequent events that actually had any connection, indirectly, with the jurisdiction issue here was the eventual refusal of the court to allow plaintiffs to amend indefinitily.

The third quotation presented by petitioners on the proposition is from *Lehigh Mining & Mfg. Co.* v. *Kelly,* 160 U. S. 327, 337, 16 S. Ct. 307, 40 L. ed. 444, as follows:

> " 'The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record'."

In the instant case the jurisdiction of the Federal Court did appear from the record, and the Court's very extended and careful consideration, and the conclusion and decision were based entirely upon the record. The above quoted rule has not herein been violated.

The fourth and last ground claimed by petitioners is:

> "That said court has sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this court's power of supervision."

May we say, without meaning to be facetious, that petitioners must have had in mind the "accepted and usual course of judicial proceedings" of their local Creek County court, where they had planned to keep Mr. West of Kansas to their advantage and his disadvantage.

We believe it may, at this point, be considered pertinent and permissible very briefly to submit a few facts from the record, particularly since the petition filed herein is rather cleverly designed to give one an impression that the petitioners are pure, innocent shorn lambs who have been pounced upon by the wolves. That purpose is made conspicuous in their summary statement near the beginning of their petition. With a similar obvious motive, the petition contains a complaint of the inexcusable size of the record, as if they were not responsible for it, including a substantial portion from the record of another case entitled "*United States of America* v. *Gerald Updike, et al.*, No. 1510-D" (R. 262-298).

Pursuing the same motive the petitioners have selected and quoted portions from observations made by the District Court from time to time during the various proceedings and hearings before that court, and in connection with which the court saw fit to give free expression to his trend of thinking, his doubts and his conclusions; all of which is merely evidence of the fact that the District Court was generally disposed to be very indulgent with the plaintiffs and gave them the utmost consideration and extension of time. Such excerpts from remarks by the court are necessarily misleading.

The respondent, Ivan M. West, was and is, without dispute, a resident of Wichita, Kansas, where he has a long established firm of certified public accountants, with no other place of business and no slightest indication of residence elsewhere.

During the late war he was called upon by the United States Army for service in checking war plants. In the early part of 1944, by arrangement and direction of Colonel Trask of the United States Army, he made a professional investigation of the records and financial condition of the Updike Awning Company's plant at Sapulpa, Oklahoma, then engaged in manufacturing war materials for the army. His report thereon to the army caused the army officers to require drastic changes in the management and operation of said plant, in order to protect the Government's investments therein. (R. 226-229) For a while there was an agreed arrangement under which West stayed at the plant and managed the fiscal affairs with Gerald Updike, one of the partners, managing the production. (R. 230) That was soon found unsatisfactory. West did not know, and was not expected to know, the production end of such a plant. The army officers, Colonel Trask and Major Bixby, arranged for the employment of Dunlap and Nacheff to superintend the production in the plant. West had not known Dunlap and Nacheff, and they had not known him. (R. 231) A written contract, prepared and promoted by an attorney for the Federal Reserve Bank of Kansas City as fiscal agent for the War Department, was entered into between West and the Updike partners, providing for his specific duties and compensation. (R. 15 and 229) Another contract prepared and promoted by the same attorney, was entered into between the Updikes and Dunlap and Nacheff, providing separate specific duties and compensation for them. (R. 23

and 229) The Updike partners then wrote a letter to the Federal Reserve Bank, as fiscal agent for the War Department, specifically approving both said contracts. (R. 25) Those contracts expired April 1st, 1945, and by agreement of the parties each was extended in operation for one month. (R. 265) During that month, April 1945, the United States of America instituted a suit in the United States District Court for the Northern District of Oklahoma entitled: "*United States of America* v. *Gerald Updike, et al.*, No. 1510-D," for the recovery of the balance then due the War Department and the National Bank of Tulsa from said defendants and asking for the appointment of a receiver. On April 20, 1945, the Federal Court appointed a receiver and he took charge of the business and affairs of the company. (R. 263-265) By direction of the receiver (R. 265) West continued his services, and in the receivership proceeding West filed claim for the balance due under his contract prior to the receivership, and separately for his services performed for the receiver, and the court upon hearing thereof, contested by petitioners herein and their counsel, made allowances to West for such services. (R. 297-298)

Shortly after the receiver was appointed, as aforesaid, and while West was in Creek County, Oklahoma, performing duties on behalf of the said receiver, petitioners commenced this lawsuit in the Creek County Court and caused summons to be served upon West in that county. (R. 6-9)

There would, of course, have been no doubt of West's right to remove such suit to the Federal Court if he had been the only defendant. But petitioners therein added as defendant with him, the National Bank of Tulsa, Oklahoma, obviously a resident of Oklahoma, and served summons on it in Tulsa County, and added Dunlap and Nacheff as defendants, and served summons on them in Kay County,

Oklahoma, where they were at that time operating a war production plant. (R. 6-9)

The petition as filed in said suit, in general and vague terms, asserted a claim in the amount of $75,000.00, against all four of said defendants, as being jointly responsible to the plaintiffs for breach of a contract in the management and operation of Updike Awning Company's business.

Respondent West, as a citizen of the State of Kansas, duly asserted his right to trial of the action in the Federal Court, by proper allegation thereof in a petition for removal. He asserted that the other three defendants had no kind of connection with his contractual relations with the plaintiffs, and he included in the removal petition a copy of his written contract with the plaintiffs, covering the only existing contractual relations between him and plaintiffs and constituting ample evidence of the fact that the other three defendants were not concerned with it or with any of his obligations to the plaintiffs, and constituting ample evidence of the fact that the plaintiffs did not have, and knew they did not have, any legal ground for joining the other defendants with the defendant West upon a pretended claim that they were jointly liable to the plaintiffs under a joint contract, and that plaintiffs had so framed their petition as filed in the state court for the fraudulent purpose of depriving West of his legal right to a trial in the Federal court (R. 13-14).

Petitioners herein apparently make the contention that the removal petition did not plead facts showing a fraudulent joinder, because the removal petition claimed that all four of the defendants were non-residents. (p. 5 of Pet. for Cert.) The removal petition did not claim, and it has never been claimed by anybody, that the defendant National Bank of Tulsa was not a legal resident of the State

of Oklahoma. The other defendants, Dunlap and Nacheff, claimed that when they were served with summons in Kay County, Oklahoma, they were only temporarily there operating a plant for the production of war material and that their long established principal place of business, the Langdon Tent & Awning Company (R. 165), was located in Kansas and that their actual residence was in Kansas; but they also definitely asserted in the removal petition that they had no legal connection with West or the bank and no joint liability with him and were joined with him and the bank in the suit for the fraudulent purpose of preventing removal.

The plaintiffs did not, in their motion to remand, nor in their alias motion to remand filed some two years after removal, deny that the separate contract of respondent West as attached to the petition for removal constituted the only contractual relation between him and them, and they did not deny that a separate written contract between plaintiffs and Dunlap and Nacheff, as attached to the removal petition, constituted the only contractual relation between those parties, and did not deny that there was no legal ground for claiming joint liability as between West and the other defendants, and did not deny fraudulent joinder as set out in the removal petition.

On the first motion to remand the court found that all of the defendants, except the bank, were residents of Kansas, but that there was separable controversy and that the court had jurisdiction of the action. The respondent herein, Massachusetts Bonding and Insurance Company of Boston, Massachusetts, was then, by the plaintiffs, added as a defendant in the case, upon the ground that it was jointly liable with defendant West because of being surety on his fidelity bond required by the War Department. (R.

42) After numerous hearings on pleadings and numerous amended pleadings filed by the plaintiffs and pre-trial hearings had been had and the case had been set for trial several times, and the plaintiff dismissed the case as to defendant bank, they filed a second or alias motion to remand, and the court then concluded, with an expression of serious doubt about the fact, that the defendant Nacheff had established legal residence in Oklahoma; but the court still held it had jurisdiction of the case, on the ground that there was, on the face of the record, actually a separable controversy as to defendant West and that there was no right to join the other defendants with him under a claim of joint liability and that they had been so joined for the fraudulent purpose of preventing removal to the Federal court.

The opinion of the Circuit Court of Appeals (R. 303-307) reflects the foregoing facts and findings of the court as based upon the record, and the Circuit Court applied well established rules of law to affirm the District Court's action.

It is now four years that this case has been pending. Respondents Ivan M. West and Massachusetts Bonding and Insurance Company respectfully urge that there is no proper ground for further review of the decisions of the two lower courts and that certiorari herein should be denied.

Respectfully submitted,

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